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No. 90-198

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1990

ANNE ANDERSON, ET AL.,  
PETITIONERS,

v.

BEATRICE FOODS CO.,  
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT

**Motion for Leave to File Brief Amici Curiae and  
Brief Amici Curiae in Support of Petitioners'  
Request for Writ of Certiorari Submitted By  
Harvard Law School Environmental Law Society  
and Conservation Research Group of  
Boston College Law School**

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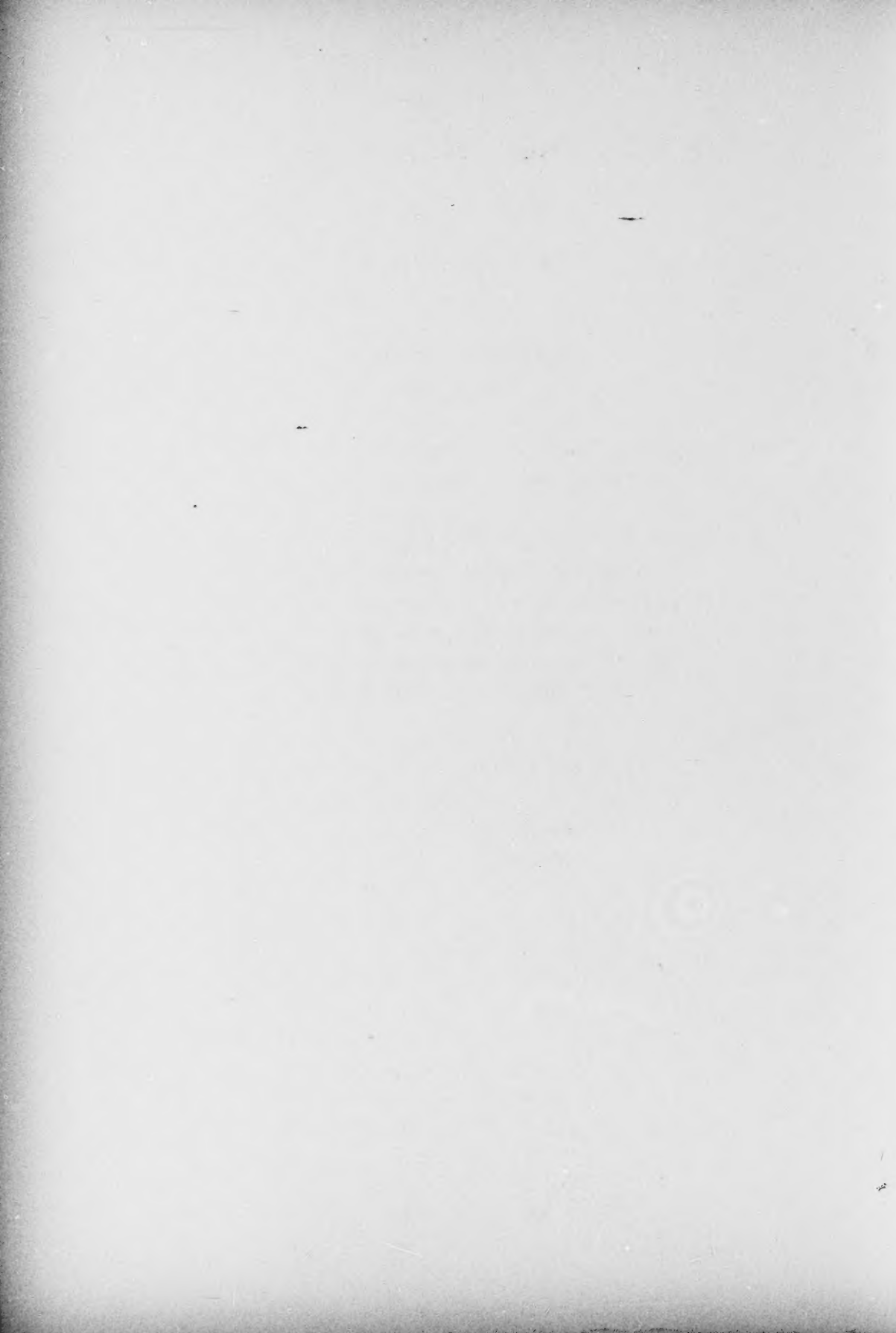
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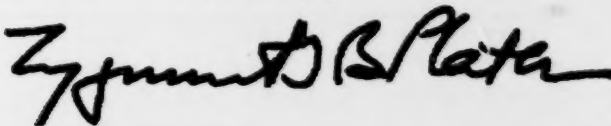
Pursuant to Rule 37.2 of the Rules of  
the Supreme Court of the United States,  
the Harvard Law School Environmental Law  
Society and the Conservation Research  
Group of Boston College Law School  
respectfully request leave to file the  
enclosed Amici Curiae Brief in support of  
Petitioners' Request for grant of a writ

of certiorari to the First Circuit Court  
of Appeals.

Consent to filing this brief was  
refused by counsel for respondent and  
granted by counsel for petitioners.

Dated: August 29, 1990

By their attorney,

A handwritten signature in black ink, appearing to read "Zygmunt Plater". The signature is fluid and cursive, with the first name "Zygmunt" written in a larger, more prominent script than the last name "Plater".

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## STATEMENT OF INTEREST OF AMICI CURIAE

As law students, our interest in this case derives from a strong conviction that the courts' integrity, and the integrity of the legal profession, have been violated. We intervene because of the failure of the district court and the Court of Appeals for the First Circuit to remedy respondent's admitted intentional misconduct, or even to investigate the full scope of that misconduct. This seems to us wrong as a matter of law and far afield of the courts' customary vigilance against such behavior.

As members of the Environmental Law Society of Harvard Law School and the Conservation Research Group of Boston College Law School, we recognize the importance this case has already assumed in the fields of tort and environmental

law. The stature of this case, combined with the seriousness of the latest revelation, sets further influential and disturbing precedent with respect to the courts' treatment of misconduct. Unless investigation and a new trial are ordered, we are concerned that the federal courts will be perceived as permitting behavior prohibited by the Federal Rules of Civil Procedure and simply wrong by any standard of good conduct. Our desire as future officers of the courts is that the Court denounce intentional concealment of evidence as unacceptable conduct, and that it fashion rules and remedies to deter, not reward, such behavior.

## INTRODUCTION

This petition for certiorari arises from affidavits and findings of deliberate misconduct concerning respondent's attorneys in a toxic tort pollution case. Two issues of fact and law crucial to the integrity of the litigative process are presented. First, what is the proper standard for granting a new trial under Federal Rule 60(b)(3) after a finding of deliberate misconduct by a party or party's attorney has been made? Second, what is the responsibility of the courts to investigate and sanction deliberate misconduct, and has that responsibility been discharged properly in the present case?

We are sympathetic to the daunting appearance of this case to a reviewing court. This Court, however, need review

only a fraction of the record to resolve the relatively narrow issues raised on certiorari. Even if the Court's task were more arduous, the failure to censure unethical behavior by declining a grant of certiorari would compromise the integrity of the judicial process.

#### ARGUMENT

I. THE FIRST CIRCUIT'S DENIAL OF A NEW TRIAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)(3) WRONGLY APPLIES THE CIRCUIT'S OWN STANDARD AND FAVORS DECEPTION OVER HONEST AND TRUTHFUL CONDUCT.

- A. By the Circuit's own standard established before remand in this case, the petitioners are entitled to a new trial.

Petitioners (plaintiffs-appellants below) claim that respondent's deliberate concealment of the withheld Reports (which showed toxic contamination by the "complaint chemicals" on the tannery

site, A.42a) caused substantial interference with the development and presentation of their case, entitling them to a new trial under Federal Rule of Civil Porcedure 60(b)(3). The rule laid down by the First Circuit in Anderson I holds that substantial interference exists if a party shows that "concealment precluded inquiry into a plausible theory of liability, denied it access to evidence that could well have been probative on an important issue, or closed off a potentially fruitful avenue of direct or cross examination." (A.27a).

On remand, the district court found that the concealment did substantially interfere with an important element of petitioners' case, namely, proof of the flow of groundwater from the tannery to wells G and H. (A.79a-80a). However,

both the district court and the Court of Appeals after remand departed from the "substantial interference" definition set out by the Court of Appeals in Anderson I (A.27a). Despite its own findings, the district court refused to grant a new trial, believing petitioners had insufficient evidence regarding a separate aspect of their case, which was the tannery's use and disposal of chemicals alleged to have polluted the wells. The First Circuit in Anderson II affirmed the district court, stating that the "dearth of evidence" on use and disposal of complaint chemicals was a "good indication" that petitioners would be unable to prove the "essential elements" of their case. (A. 111a). The First Circuit therefore, ignored the standard set down in Anderson I which requires that only one element of the



aggrieved party's case suffer substantial interference as a result of the concealment.

Both lower courts erred in their statement of the law and its application to the case at bar. The standard applied by the district court and the Court of Appeals is tantamount to evaluating the likelihood of success on the merits. In applying the rule of Anderson I, the district court and the First Circuit went beyond the threshold issue of whether substantial interference was found, and held in effect that no matter how petitioners had been prevented from getting evidence of groundwater flow due to respondent's concealment, there was a "good indication" that petitioners would not have found sufficient evidence about the respondent's use and disposal of complaint chemicals. (A.111a). Even

though this is a separate issue, no new trial was granted. The proper application of 60(b)(3) as originally interpreted by the First Circuit in Anderson I (and by other circuits cited by the Court) is that interference with one element of a case entitles a party to a new trial. If other elements of the case are argued to be lacking, that is a matter to be decided at a fair trial, unhindered by concealment.

Furthermore, there is reason to believe that a new trial in this case could lead to discovery of evidence of disposal on the tannery site. Although the site has been excavated (the degree of excavation and removal is in dispute), petitioners can still depose tannery personnel and third parties participating in the excavation. In addition, if discovery established that there had been

a post-trial "clean-up", petitioners could use the existence of the clean-up as evidence of the presence of complaint chemicals. Although it is not certain that petitioners would discover evidence of disposal of complaint chemicals, as victims of intentional misconduct they are at least entitled to a chance at fruitful discovery. Should that attempt prove unavailing, petitioners' action would then end without great strain on the courts.

- B. A court's refusal to grant a new trial after finding deliberate misconduct gives a wrongdoer tremendous strategic advantages and created dangerous pressures to deceive.

Pressure on litigants to conceal evidence is directly proportional to the value of that evidence. In this action, the concealed reports would have given

petitioners' expert, Dr. Sykes, a basis for concluding that groundwater flowing from the tannery could have reached wells G and H. (A.79a-80a). The concealed evidence also might have provided petitioners with a basis for finding evidence not otherwise discovered. In this case, evidence showing groundwater flow would have provided a much stronger basis for petitioners' pretrial request, denied by the trial judge, to test for complaint chemicals on the tannery property. Had this evidence been produced in discovery, the district court might have granted access to the tannery, which surprisingly was refused.<sup>1</sup>

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<sup>1</sup> The First Circuit notably held that the district judge's denial of tannery access, regardless of the Reports, was itself based on respondent's "specious argument that Beatrice could not grant access" (A.41a n16); accordingly

A new trial, at best, restores aggrieved parties to the position they would have enjoyed if opposing counsel had played by the rules. If litigants believe they can intentionally conceal evidence and, if caught, argue against a new trial on the ground that some other element of the injured party's case is allegedly lacking, then the incentive to conceal is multiplied.

The district court and the First Circuit were justifiably concerned with the strain new trials might put on the courts. The hurdle of summary judgment, however, will minimize the strain on the courts for cases lacking substance. More importantly, the need to uphold the integrity of the judicial process amply

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<sup>1</sup>(Cont.) petitioners were prevented from testing for the complaint chemicals at respondent's plant site and had to base their case on offsite evidence.

justifies the further use of court resources.

The Supreme Court exercises leadership over the courts of the United States. That leadership should not be used to soften standards for retrial where deliberate misconduct or fraud has substantially affected an element of an innocent party's case.

II.        RULE 11 AND 37 PROHIBITIONS  
             AGAINST INTENTIONAL MISCONDUCT  
             AND FRAUD EXIST TO PRESERVE THE  
             INTEGRITY OF THE COURTS, TO  
             DETER PERNICIOUS BEHAVIOR AND TO  
             REWARD HONESTY, AND SHOULD BE SO  
             APPLIED.

The sanctions against misconduct authorized by the Federal Rules of Civil Procedure in Rules 11 and 37 bear witness to the fact that, absent these sanctions, some attorneys will not conduct themselves according to the canons of fair conduct embodied in the Federal

Rules. Underlying these rules are policies of judicial integrity and realities of legal practice requiring energetic investigations of misconduct.

Two practical considerations make active investigation by the courts necessary to deter deliberate misconduct effectively. First, deliberate misconduct probably is discovered much less often than it occurs.<sup>2</sup> Second, if misconduct is not investigated, and, if necessary sanctioned, a wrongdoer has everything to gain and nothing to lose. If the concealment remains undiscovered, the wrongdoer gains the benefits of

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<sup>2</sup> The district court calls petitioners' discovery of the concealed reports "fortuitous" (A.74a), while the First Circuit termed the discovery "serendipitous" (A.22a). Both opinions seem to reflect the court's experience that the chances of discovering such concealment are slight.

deception, and a favorable judgment is more likely. Therefore, if the misconduct is "fortuitously" or "serendipitously" revealed, it is all the more important that a new trial be granted so that, at the very least, the wrongdoer is in the same position (s)he would have occupied had (s)he acted ethically.

In addition to the very practical need to deter misconduct, this Court's response to malfeasance carries symbolic value. A clear statement by the Court is needed to signal attorneys and their clients that misconduct of this kind will not be tolerated.

Finally, attorneys who practice honestly and fairly should at least be able to compete with their less scrupulous peers on a level playing field. Where those with fewer scruples



attempt to change the balance, only the courts are in a position to correct the situation. Virtue may be its own reward, but courts that refuse to investigate and, if necessary, sanction unethical conduct grant a boon to the very evils the law should attempt to correct.

III. THE DISTRICT COURT ABDICATED ITS RESPONSIBILITY TO PRESERVE JUDICIAL INTEGRITY BY FAILING TO INVESTIGATE VIGOROUSLY THE EXTENT OF MISCONDUCT BY RESPONDENT'S ATTORNEYS.

Effective and appropriate remedial actions cannot be taken until the full extent of misconduct has been investigated. The same policies that necessitate sanctions if there is misconduct, require the discovery of that misconduct so that it may be remedied and thereby deterred. The crux of the problem addressed in this case's history is that neither the district court nor

the First Circuit addressed sworn  
statements pointing to deliberate  
misconduct by respondent's attorneys.

In November 1989, attorney Mary Ryan filed an affidavit averring previously unrevealed communications between Ms. Ryan and Beatrice's attorneys, Mr. Facher and Mr. Jacobs. She also made an offer of proof of 41 documents contradicting Mr. Facher's and Mr. Jacob's prior statements about their involvement with and knowledge of the concealed reports. (A.103a-104a). If believed, Ms. Ryan's allegations would tend to implicate Beatrice's attorneys in two forms of misconduct, both during discovery and subsequently at the misconduct hearing itself. The court flatly refused an evidentiary hearing on these allegations, asserting that Ms. Ryan lacked "standing" to make such an offer of proof.

(A.102a). Deliberate misconduct violates the integrity of the courts, and the district court was duty-bound to investigate it. Failing to respond to allegations of intentional malfeasance violates the principles underlying Federal Rules 11 and 37 and flouts the very purpose these rules are intended to serve.

The district court's failure to investigate allegations of deliberate misconduct, in light of the November 1989 admissions, is both puzzling and distressing. It is made even more disturbing because the court used this misconduct to balance misconduct it attributed to petitioners' attorney in proceeding to trial without the wrongfully-withheld evidence. Put simply, the district court could not strike a "balance" without knowing what

respondent's attorneys had done. The court's decision not to investigate further thus deprived petitioners of the relief to which they were entitled if respondent's attorneys engaged in deliberate misconduct.

The First Circuit's deference to the district court should not have extended to an incomplete investigation of misconduct. Amici curiae recognize the district court's energy in pursuing its mandate on remand, which was large in scope. It is understandable that the court, after tremendous exertion, was concerned about conserving judicial resources. Although the district court's concerns are understandable, its failure to investigate fully should not have been overlooked or upheld by the First Circuit. Although the First Circuit mentioned the defendant's misconduct in

failing to produce documents (A.119a), it took no notice of Ms. Ryan's November, 1989 averments alleging further concealment of complicity by attorneys for Beatrice. The district court's Memorandum regarding Ms. Ryan's revelations went unmentioned by the Court of Appeals. Accordingly, the First Circuit could not have determined whether the district court's rulings on sanctions were clearly erroneous when neither the Court nor the district court fully knew what misconduct had taken place.

Courts alone are able to regulate the behavior of the advocates and parties appearing before them. This Court's strong defense of fair play can deter those tempted to abuse the system and will uphold the courts' traditional role as public forum and symbol of justice. The integrity of the judicial system,

therefore, requires a remand for vigorous investigation into the alleged misconduct.

Certiorari is further warranted because of the substantial split in the Rule 60(b)(3) standards between the 1st Circuit in this case, and other circuits that have addressed this issue. See In Re M/V Peacock, 809 F.2d 1403, 1404-05 (CA9 1987) (Kennedy, J., indicating that the grant of relief should be more forthcoming where concealment is intentional); Harre v. A. H. Robbins Co., 750 F.2d 1501, 1503 (CA11 1985); Stridiron v. Stridiron, 698 F.2d 204, 207 (CA3 1983); Square Construction Co. v. Washington Metropolitan Area Transit Authority, 657 F.2d 68, 71 (CA4 1981); Rozier v. Ford Motor Company, 573 F.2d 1332, 1339, CA5 1978).

## CONCLUSION

Fairness requires that the Supreme Court, under Federal Rule 60(b)(3), order relief in the form of a new trial, to restore the petitioners to at least the position they would have enjoyed had respondent and its attorneys acted within the law. Furthermore, the Court's role as trustee of the integrity of the judicial process demands an order requiring a vigorous investigation into the misconduct averred but heretofore ignored. In order to reach these important merits and rectify a blemished trial process, the petition for certiorari must be granted.

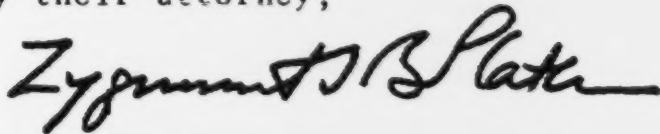
Dated: August 29, 1990

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By their attorney,

A handwritten signature in black ink, appearing to read "Zygmunt Plater". The signature is fluid and cursive, with a long horizontal stroke at the end.

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